

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1332

To be argued by
PAUL B. BERGMAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1332

UNITED STATES OF AMERICA,

Appellee,

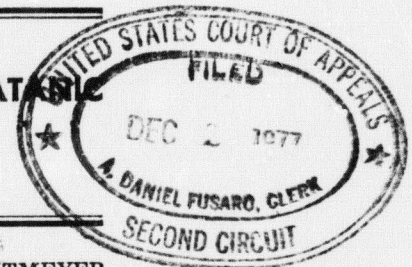
—against—

ZVONKO BUSIC, JULIENNE BUSIC, PETAR
MATANIC and FRANE PESUT,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANTS PETAR MATANIC
and FRANE PESUT



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ZVONKO BUSIC, JULIENNE BUSIC,
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Defendants-Appellants.

REPLY BRIEF FOR APPELLANTS
PETAR MATANIC AND FRANE PESUT

Reply to Part Two, Point I
(Judicial Bias)

On the issue of judicial bias, there are three major themes to the government's brief. One is that the district court was really helpful to the defense, the "proof" of that being the acquittal of Matanic and Pesut on the death count. Their acquittal, according to the government, is the "most significant red flag"..."to the baselessness of the assault on Judge Bartels..." (Brief, at 28). Second, that defense counsel conducted themselves in such an atrocious manner that even if the district judge stepped beyond proper bounds it was understandable. Finally, while the government does not have the temerity to come

straight out and say it, suppressed within nearly every page of its 112-page brief is the main third argument that, even though the district judge may have exhibited bias, Matanic and Pesut are so clearly guilty (not only of the crimes for which they were convicted, but the crime for which they were acquitted!) that this case is surely one for the harmless error rule, despite the lengthy deliberation of the jury in the face of a full defense.

We do not intend to belabor this Court much beyond the extensive argument in our main brief. The record speaks for itself and we will certainly not rehash the numerous instances of judicial bias, set forth in our main brief which have been totally ignored by the government. We wish to make, however, a few brief comments in the nature of reply.

As to the claim that defense counsel conducted themselves poorly, we believe that the government has not been able to sustain that conclusion in the slightest. In fact, a reading of the record will show that all counsel conducted themselves with the utmost propriety under very difficult circumstances created by the court. Indeed, if there was any "baiting" going on, it was on the district court's part, as a full reading of the record will show. Nevertheless, the government claims broadly that defense counsel's conduct bordered on contempt (Brief, at 27). Yet, strive as we are sure it did, it has been unable to unearth any show of disrespect, let alone contempt, exhibited to the court by counsel for Matanic and Pesut. In fact, if anything, the district judge's continuous assaults on counsel were absorbed with a remarkable

degree of self-control. In short, the district court's conduct toward counsel for Matanic and Pesut was simply and relentlessly vituperative and insulting.

The argument that Judge Bartels "helped" the defense is absurd, notwithstanding the government's obvious and extreme displeasure with the first count acquittal of Matanic and Pesut.

The government claims that the aiding and abetting charge was error, in favor of the defense (Brief, at 20). However, given the extensive line of common law authority supporting the defense position on vicarious criminal liability and transferred intent, which was brought to the court's attention early in the trial^{1/} the court would have been hardpressed to follow the ambiguous and isolated authorities cited by the government.

The court's charge on ey witness identification, which the government claims was not required, is clearly cautioned for in United States v. Gentile, 530 F.2d 461, 468 (2d Cir. 1976) and United States v. Fernandez, 456 F.2d 638, 643-644 (2d Cir. 1972). United States v. Marchand, ___ F.2d ___ (2d Cir. Slip op. 5391 (August 22, 1977)), which was decided four months after the trial ended, hardly alters the teaching of the prior cases. In fact, considering the importance of the eyewitness testimony of the government's witnesses Gore and Braccaglia and the fact that a specific instruction was requested (Joint App. at 398), the court

^{1/}A raft of case authority had been cited to the Court prior to the close of the government's direct case (T. 2544) in the Memorandum of Law in Support of the Defendant Matanic's Motion for a Judgment of Acquittal on Count 1 pursuant to Rule 29(a), F.R. Crim.P. Those cases clearly justified and, in fact, mandated the court's ultimate charge on the issues of vicarious liability and transferred criminal intent.

could have done no less than it did.

As to the charge concerning the voluntariness of confessions, which the government claims was a gift to the defense, it is enough to say that the court refused to give a proper defense request to charge (Joint App. at 389).

To go further in this vein would be pointless. That Judge Bartels conducted himself prudently at times hardly answers all those instances in which he did not.

In attempting to "weight" the claimed evidence of guilt, the government has, in several instances, taken liberties with the record in order, we suppose, to make its harmless error argument more compelling.

The government insists on carrying forward in its brief a glaring misstatement that had been made to the jury during the prosecutor's summation; i.e. that just after Busic had hijacked the plane, Julianne Busic introduced Matanic and Pesut as members of the hijack team, an argument redolent with an adoptive admission, at the critical, early stage of the hijacking (Brief, at 73 n 49). The fact is that she merely pointed them out and made no introductions at all (T. 3720-21).

The government also carries forward the misstatement which was included in the government's summation that Matanic kept the teargas gun given to him by Busic (Brief, at 6). There was no such evidence and in fact, the witness upon whom the government relies (Noreen Collins) testified that she never saw "anything metallic" (T. 4812), despite her impression that it was more than

just a hand (id).

The government's recounting of the episode in Paris, when Matanic left the plane with a sick passenger and the steward, Tom Van Dorn, is altogether wrong (Brief, at 12). Matanic was not ordered by Vlasic to get anybody back on the plane.

The government cites to Captain Carey's testimony (T. 1554) that "[a]ll the members of the group assisted one another in accomplishing whatever difficulties they had with the passengers or with [the crew]" (Brief, at 8), yet neglects to point out that during the critical beginning stage of Zvonko Basic's hijacking of the aircraft, Carey was in the cockpit (as he was for nearly the entire flight) flying the plane and could not possibly have seen what was going on in the cabin (T. 1722-23).

The government speaks of the "sadistic" threats by Basic and "others" but neglects to point out that the only "others" was one, Vlasic (Brief, at 14).

The government implies that Matanic paid for his own ticket (Brief, at 23 n 14) when he clearly did not and, in fact, no such claim was made by the government at the trial.

The government plays a word game with Zvonko Basic's statement to the FBI that Pesut and Matanic were "aware" of the hijacking (Brief, at 26), even though Basic never said to the FBI agent that he had told them of his plans (e.g., T. 4591-92, 2595-97), a crucial distinction which was also obliterated by the district court during the summations (e.g. T. 5652-53).

The government claims that Matanic was a close associate

of the other defendants (Brief, at 103). But the fact is that Matanic had not spoken to Vlastic in four or five years, had met Pesut on September 9 for the first time, had only recently met the Busics and did not, in fact, know Julianne Basic except as a casual acquaintance (T. 3857-59).

Finally, the government's attempt, on appeal, to downplay the testimony of Hochstetler and Davidheiser is ludicrous. Hochstetler, who was the government's second witness and the only passenger it called on its direct case, testified on direct longer than any other passenger, even Noreen Collins, who had to be called on the government's rebuttal case to attempt a rescue of Hochstetler's testimony. Now, the government seeks to jettison Hochstetler altogether, even claiming that his testimony was "helpful" to the defense.

Incredibly, the same approach is taken as to the court's incessant rehabilitation of Agent Davidheiser whose testimony the government now states "contained exculpatory material" (Brief at 92).

Moreover, the government has the nerve to state as to Davidheiser's testimony: "So unnecessary was the post-arrest confession [of Matanic] to our case it was not even offered in the direct case" (Brief, at 93). Clearly, however, once the defendants had signified in their openings that they would testify, it became a crucial part of the government's trial strategy to keep the post-arrest statements of the defendants in the wings thereby enabling it to cross-examine the defendants with maximum

effect. And, in fact, Matanic and Pesut were cross-examined extensively along those lines.

We are told, in effect, that the court's embracement of Hochstetler and Davidheiser was really for the benefit of the defense. That such statements are made at all, let alone elevated to an argument, shows the poverty of the government's position and its need, ultimately, to retreat to a harmless error argument.

In an attempt to justify the district court's conduct, the government has pieced together a few instances when, in its view, the court properly responded by either curtailing testimony or an argument or belittling counsel. It has ignored many of those instances cited in our main brief as well as those other occasions which appear throughout the trial but which could not be expressly described in the brief if decent page limitations were to be observed. To the limited extent that the government has addressed the court's demonstration of bias during the trial and the summations, the government has attempted to replace with rhetoric that which is unsupportable by customary argument. Black is said to be white and strawmen are continually set up.

Our reply will be limited to some of the more significant errors in the government's brief.

At page 97 n 62 of its brief, the government states that one of the instances of the court's impropriety, during Hochstetler's testimony and cited in our brief (at p. 20), is baseless. First of all the government has misquoted the record. The statement of Matanic's counsel was "I thought the first time

you reviewed it fully was this morning in court" [T. 1949], not, as the government states "...received it fully...." That aside, citing to pages T. 1894-95, whereat Hochstetler states that he "leafed" through the report but did not "digest" it, the government then proclaims that "Mr. Hochstetler had not given such testimony", i.e., that he fully reviewed it. But, the fact is that Hochstetler, after he had given the testimony at T. 1894-95, was then physically given the report, a recess was had, he read it in the witness room and acknowledged that he had read it when he returned to court (T. 1897-99, 1902). In short, Judge Bartels' caustic rebuke of counsel was totally unjustified by, as the government states, "...the incorrect statement of Mr. Matanic's counsel..." (Brief, at 87, n 62). The government has simply ignored the record.

At page 94, n 66, the government again distorts the record. The complaint that we clearly made in our main brief (at p. 32) was that Judge Bartels did not permit inquiry as to the process by which Davidheiser had composed his final, typed 302 report, not the process by which he had written his notes during the actual interview, although even that series of questions was tinged with the court's bias (T. 4380). The government, however, impelled to show "Matanic's misleading nitpicking", then, in footnote 66, completely twists the record by falsely stating that the questions attempted to be asked at T. 4382 had already been asked, citing to the earlier interrogation concerning the handwritten notes. It was not the "umpteenth" time at all, but

the first time that counsel asked questions concerning the typed report.

The government's statement that there was not agreement with respect to the noninterruption of summations (Brief, at 65 n 42) is simply false.^{2/} There was such an agreement between all counsel (T. 5648, 5678), which was scrupulously honored by all defense counsel, not by the government. Moreover, the government's suggestion that defense counsel's silence during the Assistant's summation was not the result of our agreement but really part of a scheme to secretly leave errors in the record is ridiculous. Surely, if that was our plan, we would not have pleaded with the court as much as we did, after the government's main summation, to correct the blatant errors in the summation (T. 5449-80).

The government states (Brief, at 101) that "[t]he Matanic brief claims that on seven occasions his counsel was improperly interrupted." We don't believe that this is a numbers game but we hope it is clear from our brief that there were numerous other instances, not detailed in our main brief, where the court and, with its acquiescence, the Assistant improperly interrupted or commented on Matanic's and Pesut's counsels' summations. All told, there were 43 interruptions of the Matanic

^{2/} We find it strange that the Assistant United States Attorney who tried the case and with whom the agreement was made has not participated in preparing the government's brief on appeal.

summation which, averaged out over a two-and-a-half-hour summation, comes to about one interruption every four minutes. Pesut's counsel was interrupted more than a dozen times. Out of simple space considerations we chose some but hardly all of the most egregious and prejudicial interruptions. The point here is that we do not accept the government's unilateral attempt to truncate our argument with respect to the court's interference with defense summations. At best, every single interruption of both summations, except those few involving the court's concern over their length, was uncalled for and served to prejudice the defense. Taken as a whole, the sheer number of interruptions and their tone, in contrast to the court's absolute silence during the government's summation, portrayed the bias of the court.

As to those interruptions which the government has chosen to deal with it seem clear that it - as had the district court - has lost sight of the right to argue inferences and, otherwise, sum up. It is proper, we submit, to speak of a defendant's high reputation in the community, and phrase it in terms of "admiration" (T. 5591) based upon the testimony of character witnesses. Moreover, it is proper to tell a jury of the importance of a case (T. 5483) without being accused of making a "blatant appeal to sympathy" (Brief, at 98). Moreover, it is proper to tell a jury that they are the sole judges of the facts, that their decision is, in effect, "supreme" (T. 5577). As to Matanic's reasons for going with Basic at all, it was proper to speak of the common experiences and feelings of men and urge that

Matanic was susceptible to guilt feelings because of his previous inactivity on behalf of Croatian independence (T. 5593).

Mr. Rochman's statement that Pesut "smiles when he doesn't understand" (T. 5559) was entirely proper. The evidence Pesut had offered showed that he spoke no English. In fact, one of the two clothing salesmen had spoken of Pesut's "blank look" (T. 5134) and the entire tenor of their testimony was that Pesut had no real comprehension of what was being said to him. Nevertheless, he grinned when he was shown a tie and shirt. According to Pistilli, the salesman, "I took the tie and put it down and I started talking. Just started talking, asking him if he liked it. I didn't get any kind of response. I got a smile out of him, but it seemed to me that he wasn't going to talk to me" (T. 5141). Of course, the government has omitted the foregoing testimony in its brief (at p. 100, n 70).

As to Pesut not being a political radical, there was no evidence that he had previously engaged in radical conduct and it was proper to argue a negative proposition.

At page 103 of its brief, the government claims that no evidence supported the argument that, in Carey's presence, Basic would summarily dismiss Matanic when he sought an audience. Carey's testimony alone supported that argument. But, in addition, Matanic himself had testified that he was repeatedly rebuffed by Basic when he attempted to speak with him (T. 3907, 3909).

As to Matanic's fear for the safety of the passengers, for which the government claims there is no support in the record

(Brief, at 103-104), Matanic testified that he did fear for their safety (T. 3907a) and, in his fractured English, that "I was afraid of myself and [everyone] else in the plane" (T. 3962).^{3/}

In sum, the government's response to our challenge to the trial conduct of Judge Bartels is to attempt to piece together a small percentage of the record, these glib contortions supposedly proving that the judge acted evenhandedly. In making its facile argument, the government liberally accuses us of rhetoric and animus. In doing so, the government, of course, does not spare the rhetoric and animus.

Having challenged the trial conduct of Senior Judge Bartels, we suffer from no delusions that this Court will resolve the matter by comparison of rhetoric. This is, indeed, a serious matter. The trial of the alleged Croatian hijackers was a major prosecution and a charge of bias of a trial judge is always serious and regrettable when necessary. We are, therefore, fully cognizant that in view of the positions of the parties this Court will review the entire trial transcript with extreme care.

When this Court does so, we stand on our initial contention that the Court will come to the irresistible conclusion that the trial judge did not dispense evenhanded justice. The judge clearly conveyed to the jury his personal conviction that Matanic and Pesut were guilty, a circumstance which requires reversal if

^{3/} The transcript mistakenly has it as "everything". In any event, his testimony is clear that he was concerned for the safety of the passengers.

the "...high reputation of Federal criminal justice and the policy of complete and even-handed fairness for the defendant are to be maintained." United States v. Fernandez, 480 F.2d 726, 738 (2d Cir. 1973).

Reply To Part One, Point III of
the Government's Brief
(The lesser included charge of
interference with the flight crew)

We are nearly content to rely on the government's statement in the note at page 54 of its Brief which purports to state the reasons why Matanic and Pesut were not entitled to a lesser included charge of interfering with the flight crew. Clearly, the plane had already been hijacked by Zvonko Basic before Matanic and Pesut did anything. Their conduct thereafter, such as it was, could quite rationally have been found by the jury to have amounted, therefore, to interference only. That Matanic and Pesut were also convicted of the conspiracy - a point stressed by the government but which only begs the question - is hardly dispositive anyway in view of the Court's charge that "... a conspirator, one who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy" (Joint App. at 617). Under that instruction, the jury could have rationally found that the original conspirators were the Basics alone or the Basics along with Vlasic and that Pesut and Matanic, to the extent that they "joined" at all, did so only after the plane had been hijacked by Zvonko Basic. Had the jury, therefore, been instructed on the

lesser included charge, it would have been permitted a rational alternative in dealing with Pesut's and Matanic's conduct on board the plane and, reasonably, could have returned a not guilty verdict on the conspiracy count.

Reply to Part Two, Point II
(The failure to turn over
the 302 reports)

First off, we don't think it is "cute" (Brief, at 109) when a defendant, although offering to advise the court of the theory of his defense well in advance of trial, refuses to tell the prosecutor. Certainly, no more cute than when the prosecution refuses to disclose on what theory it will charge a man with a capital crime (Joint App. at 211-213). In any event, Matanic's and Pesut's defenses were fully disclosed in their openings, yet the government still refused to turn over the 302 reports so it hardly would have mattered if we advised them of our case's theory a full month in advance of the trial.

Secondly, we don't think it "unreasonable" (Brief, at 109) for counsel for Matanic (and Pesut could be included as well) to ask for all reports describing their conduct. This was hardly a case in which there was a clear dividing line between incriminatory conduct and exculpatory conduct. There were subtle matters involved here, despite the government's and the court's attitude that everything done on board the plane was incriminatory.

Finally, we wish to clear away one further unwarranted attack in the government's brief (at 110, n 77) which suggests bad faith in the request for statements of passengers showing that

Matanic was not willingly participating in the hijacking. Concededly, Matanic never came flat out and stated that to a passenger. Nevertheless, those comments that he did make to the passengers were ambiguous. He hardly acknowledged that he was involved from the beginning and, in fact, when speaking with Noreen Collins, he did not answer when she asked him if he had participated in the planning (T. 4817). Moreover, he spoke ambiguously of following orders from "others" (T. 4819) and testified that he had assumed, while on the plane, that, of the five defendants, he was the only one who had not been privy to Zvonko's plan from the beginning (T. 3926). Finally, Hochstetler had told the FBI agent who interviewed him that Matanic had expressed his personal fear of dying (T. 3198) hardly a consistent statement from someone who the government claimed knew that the pot bombs were fake.

The government's view at trial that, essentially, nothing in the 302 reports was exculpatory is repeated - with a venom - on appeal. Yet, in its brief, the government claims that the government's trial counsel reviewed the 302 reports "as to all the defendants" (Brief, at 109) (emphasis added). If such a review was in fact conducted - we are at a complete loss then, to understand how it was that the 302 report of a passenger (Peter W. Plumley at T. 4029) who saw Matanic standing after the announcement by Captain Carey was not given directly to Matanic's counsel. Instead, it was given to Julianne Busic's counsel along with the representation by the Assistant that "...Mrs. Busic would be the

only one involved" (T. 3503). We wonder, therefore, what kind of arbitrary review was conducted.^{4/} Accordingly, we have requested a very limited form of relief, merely the disclosure of those reports. Cf. United States v. Morell, 524 F.2d 551, 552-53 (2d Cir. 1975).

Reply to Part Two, Point III
of the Government's Brief
(The Sentencing Disparity)

The government has hardly justified the disparity in sentencing, let alone point to where the district court justified it. Once again, the government has resorted to rhetoric, attacked counsel and forsaken customary forms of legal argument.

We hardly think it is relevant (as the government seems to think) as to whether the disparity of Pesut's and Matanic's sentence be measured as against Julianne Busic's or Zvonko Busic's or both. The fact that Julianne Busic's sentence is less than Pesut's and Matanic's serves only to emphasize further the disparity as well as the court's mechanical approach to the male defendants.^{5/}

In any event, the government's claim that we have inac-

^{4/} The government, in its brief on appeal has not represented that it has reviewed again the 302 reports to determine whether, in the hectic pace of a trial, some significant evidence, in the defense's favor, was overlooked.

^{5/} The disparity was all the more evident from the fact that Matanic and Pesut, had they pleaded guilty to count two, instead of going to trial, would have benefitted from the government's recommendation that they receive a sentence not in excess of 20 years (ST. 9-10; although this citation refers only to Matanic, we do not believe that the government will dispute that Pesut was offered the same plea bargain).

curately reflected in our brief, the position taken below (to the extent that the court even allowed counsel to state their arguments) is absurd as a reading of the sentencing transcript will show. A disparity as to both of the Basic's was claimed (ST. 65, 71, 74). It was government counsel -- because it was so obvious -- who at first focused on Julianne Basic only (ST. 65) and then, later, on Zvonko Basic when government counsel argued that Matanic and Pesut were really just as guilty as Zvonko Basic (ST. 73). Judge Bartels' supposed explanation for the disparity, which the government states appears at ST. 70 refers only to why Julianne Basic got a sentence less than her husband's. At no time, however, did the Court explain why Matanic's and Pesut's sentences were greater than hers or the same as Zvonko's as it was required to do.

Finally, district judge Bartels' comments to counsel during the sentencing can hardly be fobbed off as "needling" (Brief, at 111, n 80). They pointedly betray and are a capstone to the Court's attitude throughout the entire trial.

CONCLUSION

The judgments of conviction should be reversed and a new trial ordered; in the alternative, the Court should remand this case to the district court for the reasons and purposes set forth in Points II and III.

Dated: December 2, 1977
New York, New York

Respectfully submitted,

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LAURA ROGER , being duly sworn deposes
and says:

1. I am over 18 years of age and am not a party to this action.

2. On December 2 1977, I served ^{two copies of} the foregoing Reply Brief of Appellants Petar Matanic upon and Frane Pesut

Pierce O'Donnell, Esq.
Edward R. Korman, Esq., Chief Assistant U.S. Attorney
by depositing two true cop[ies] thereof in an official
depository under the exclusive care and custody of the United
States Postal Service located at 25 Broadway, New York, New
York, each enclosed in a postpaid wrapper, which wrapper[s]
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Sworn to before me this
2d
1st day of December 1977

Laura Roger

Notary Public

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Notary Public, State of New York
No. 03-6205016 Qual. in Good Standing
Certificate filed in New York County
Commission Expires March 30, 1978